CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child) v Pendaftar Besar bagi Kelahiran dan Kematian, Malaysia

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-35–11 OF 2020(W)
TENGKU MAIMUN CHIEF JUSTICE, NALLINI PATHMANATHAN, MARY LIM, HARMINDAR SINGH AND RHODZARIAH BUJANG FCJJ
19 NOVEMBER 2021

Constitutional Law — Citizenship — By operation of law — Citizenship by operation of law by virtue of s 1(a) of Part II read together with s 19B of Part III of Second Schedule of Federal Constitution — Child born in hospital in Malaysia — Identity of birth mother unknown — Malaysian citizen couple adopted abandoned child — Birth certificate stated child as non-citizen — Whether child born to mother permanently resident at place where finding was made — Whether child born in Federation — Whether birth mother presumed to be Malaysian — 'Any newborn child found exposed in any place' — Whether words 'found exposed' include child abandoned at place of birth by birth mother whose identity was unknown — Whether child entitled to citizenship by operation of law — Federal Constitution Second Schedule, Part III, s 19B

This appeal concerned the question of the entitlement of a child, who was abandoned at birth and later adopted, to Malaysian citizenship by operation of law. The appellants, in addition to being joint litigation representatives, were the adoptive parents of CYM ('the child'). The appellants had, in the High Court, filed an application for judicial review against the respondent seeking: inter alia, a declaratory order that the child was born in Malaysia and was a Malaysian citizen by operation of law, pursuant to art 14(1)(b), Part II, ss 1(e) and 2(3) of the Second Schedule of the Federal Constitution ('the FC'). In support of their application, the appellants argued that: (a) since the child was an abandoned child, there was no proof that he was a citizen of any other country, entitling him to citizenship under s 1(e); (b) the word 'parents' in s 1(a) of Part II of the Second Schedule of the FC ought to be construed liberally to include adoptive parents; and (c) the provisions of the Adoption Act 1952, which confer full legal rights on adoptive parents and extinguish all legal connection to the biological parents, ought to be read into s 1(a) of Part II of the Second Schedule of the FC. The fulcrum of the judicial review application in this case was the decision of the respondent to issue a birth certificate ('third birth certificate') to the child stating that the child was not a citizen of Malaysia. The High Court dismissed the appellants' application and the appellants'

appeal to the Court of Appeal was unsuccessful. Both courts were of the view that: (i) s 1(a) of Part II of the Second Schedule of the FC must be construed as having regard to the words 'at the time of birth'; (ii) the word 'parents' meant 'biological parents' and was incapable of being stretched to mean 'adoptive parents'; and (iii) reliance could not be placed on ordinary laws to interpret provisions of the FC. Hence, the present appeal.

Held, allowing the appeal; and setting aside the orders and judgments of the courts below:

(1) The answer to the question has been discussed an innumerable amount of times with the most recent being *CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2021] 4 MLJ 236. The starting point was the fundamental rights and provisions must be construed as broadly as possible while provisions which limit those rights must be construed as narrowly as possible. As such, the broadest possible interpretation of the word 'found exposed' is to accord it a meaning to include a child abandoned at the place of birth by the birth mother whose identity was unknown. The operative word 'exposed', in s 19B must therefore encompass the plight of abandoned new born children otherwise the overarching intent of preventing statelessness would be defeated or rendered illusory (see paras 49 & 54).

(2) Section 1(a) of Part II very clearly adopted the concepts of *jus soli* (citizenship based on birth place) and *jus sanguinis* (citizenship based on blood relation). Section 19B in turn contained two presumptions — one of which related to *jus sanguinis*. The operative words in s 19B are 'any new born child found exposed in any place'. This section covers new born children who were left and discovered in a place without any trace of their biological parents. Judicial notice was taken on the harsh realities of life: this included new born children left abandoned near dumpsites, baby hatches, public or school toilets, places of worship and so on. A literal meaning of 'exposed' suggested a new born child who was 'discovered' exposed at any of these locations (see paras 52–53).

(3) The answer to that assertion was that the follow up words in s 19B are contained in the phrase 'until the contrary is shown'. Meaning, any person who claimed that the child was not 'found exposed' or otherwise abandoned by the mother as the case may be, bore the burden of showing the identity of the mother and more importantly, that the mother was not permanently resident at the place of the finding. On the facts, there was no evidence to suggest that the appellants were lying about the fact of abandonment. Given that the child was born in the said hospital, surely the respondent had the means to verify from the hospital's admission records, the identity of the child's biological mother, if not the father, Therefore, as the record stood, the respondent had not been able to

discharge that burden. No affidavit was deposed nor a modicum of evidence adduced to suggest that the narrative provided by the appellants was inherently incredible or even false or untrue. Therefore, the respondent had not been able to discharge that burden (see paras 56 & 58).

(4) Once it was shown or averred that a new born child is 'found exposed', or abandoned, two things were presumed: (a) the child was born to a mother who was permanently resident at the place where the finding was made (*jus sanguinis* presumption); and (b) the date of the finding was taken as the date of the birth. Once s 19B was invoked, any party challenging any of these presumptions must either show that: (i) the child was not born of a mother permanently resident at the place where the new born child was found; or (ii) the date of the finding was not the date of the birth. The presumption, once it applied, automatically served to complete the *jus sanguinis* (parenthood) aspect of s 1(a) unless anyone claiming to the contrary could prove otherwise (see paras 59–61).

(5) Since the child was found abandoned at Hospital Universiti Kebangsaan Malaysia, it was presumed that he was born to a mother permanently resident there. It followed that he was taken to fulfil the requirements of s 1(a) of the Part II read with s 19B of Part III as he, having been born at Hospital Universiti Kebangsaan Malaysia, was born within the Federation and his mother was presumed to be permanently resident in the Federation. In the premises, the child was entitled to citizenship by operation of law by virtue of s 1(a) of the Part II read with s 19B of the Part III. The appellant was granted: (a) an order of certiorari to quash the decision of the respondent in issuing the third birth certificate and registering the child as a non-citizen, instead of a citizen of Malaysia; and (b) an order of mandamus directing the respondent to reissue the birth certificate of the child to register the child as a citizen of Malaysia (see paras 62–63 & 75).

(6) Applying the law to the facts, it was abundantly clear that the respondent failed to apply their minds to the provision in s 19B of the Part III. The learned senior federal counsel's contention that the appellants concealed facts which in turn connoted that the appellants somehow knew the identity of the child's biological parents, was unsupported by evidence. Rather than denying the child citizenship because they were unable to gather any evidence of the child's birth/biological parents, the respondent ought to have given effect to s 1(a) of the Part II read together with s 19B of the Part III. They had no right or discretion to do anything else certainly much less render the child stateless (see paras 69 & 71).

[Bahasa Malaysia summary

Rayuan ini adalah berkaitan persoalan mengenai hak seorang kanak-kanak, yang ditinggalkan semenjak lahir dan kemudiannya diambil sebagai anak angkat warganegara Malaysia berdasarkan undang-undang. Perayu-perayu, selain menjadi wakil litigasi bersama, adalah ibu bapa angkat CYM ('anak'). Perayu-perayu telah, di Mahkamah Tinggi, memfailkan permohonan untuk semakan kehakiman terhadap responden yang memohon: antara lain, perintah pengisytiharan bahawa kanak-kanak tersebut dilahirkan di Malaysia dan merupakan warganegara Malaysia berdasarkan undang-undang, menurut perkara 14(1)(b), Bahagian II, ss 1(e) dan 2(3) Jadual Kedua Perlembagaan Persekutuan ('PP'). Dalam menyokong permohonan mereka, perayu-perayu berhujah bahawa: (a) memandangkan kanak-kanak tersebut adalah kanak-kanak yang ditinggalkan, tiada bukti bahawa beliau adalah warganegara mana-mana negara lain, yang melayakkannya mendapat kewarganegaraan di bawah s 1(e); (b) perkataan 'ibu bapa' dalam s 1(a) Bahagian II Jadual Kedua PP sepatutnya ditafsirkan secara bebas bagi merangkumi ibu bapa angkat; dan (c) peruntukan Akta Pengangkatan 1952, yang memberikan hak undang-undang penuh kepada ibu bapa angkat dan memutuskan kesemua hubungan undang-undang dengan ibu bapa kandung, hendaklah dibaca dalam s 1(a) Bahagian II Jadual Kedua PP. Paksi permohonan semakan kehakiman dalam kes ini adalah keputusan responden mengeluarkan sijil kelahiran ('sijil kelahiran ketiga') kepada kanak-kanak yang menyatakan kanak-kanak tersebut bukan warganegara Malaysia. Mahkamah Tinggi menolak permohonan perayu dan rayuan perayu kepada Mahkamah Rayuan tidak berjaya. Kedua-dua mahkamah berpendapat bahawa: (i) s 1(a) Bahagian II Jadual Kedua PP harus ditafsirkan sebagai mengambil kira perkataan 'pada masa kelahiran'; (ii) perkataan 'ibu bapa' bermaksud 'ibu bapa kandung' dan tidak boleh diluaskan membawa maksud 'ibu bapa angkat'; dan (iii) kebergantungan tidak boleh diletakkan pada undang-undang biasa untuk mentafsir peruntukan PP. Oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan; dan mengetepikan perintah dan penghakiman mahkamah di bawah:

(1) Jawapan kepada persoalan tersebut telah dibincangkan berkali-kali dengan yang paling terkini adalah *CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2021] 4 MLJ 236. Titik permulaan adalah hak asasi dan peruntukan harus ditafsirkan seluas mungkin manakala peruntukan yang mengehadkan hak tersebut mesti ditafsirkan sekecil mungkin. Oleh yang demikian, tafsiran seluas-luasnya bagi perkataan 'ditinggalkan tanpa perlindungan' adalah untuk memberikan maksud untuk memasukkan anak yang ditinggalkan di tempat kelahiran oleh ibu kandung yang identitinya tidak diketahui. Perkataan operatif 'tanpa perlindungan', dalam s 19B oleh itu mesti merangkumi nasib kanak-kanak yang baru dilahirkan terbiar jika tidak, niat menyeluruh

untuk mencegah ketiadaan kewarganegaraan akan sia-sia atau menjadikannya ilusi (lihat perenggan 49 & 54).

(2) Seksyen 1(a) Bahagian II dengan jelas menerima pakai konsep *jus soli* (kerakyatan berdasarkan tempat lahir) dan *jus sanguinis* (kerakyatan berdasarkan pertalian darah). Seksyen 19B pula mengandungi dua anggapan — satu daripadanya berkaitan dengan *jus sanguinis*. Perkataan operatif dalam s 19B adalah 'mana-mana kanak-kanak baru lahir yang dijumpai ditinggalkan tanpa perlindungan di mana-mana tempat'. Bahagian ini merangkumi kanak-kanak baru lahir yang ditinggalkan dan ditemui di tempat tanpa sebarang jejak ibu bapa kandung mereka. Notis kehakiman telah diambil terhadap realiti kehidupan yang keras: ini termasuk kanak-kanak yang baru dilahirkan ditinggalkan berhampiran tapak pelupusan sampah, kelahiran bayi, tandas awam atau sekolah, tempat ibadat dan sebagainya. Makna literal 'tanpa perlindungan' mencadangkan anak yang baru lahir yang 'ditemui' tanpa perlindungan di mana-mana lokasi ini (lihat perenggan 52–53).

(3) Jawapan kepada penegasan tersebut adalah perkataan susulan dalam s 19B terkandung dalam frasa 'sehingga dibuktikan sebaliknya'. Maksudnya, mana-mana orang yang mendakwa bahawa kanak-kanak tersebut tidak 'dijumpai ditinggalkan tanpa perlindungan' atau sebaliknya ditinggalkan oleh ibu mengikut mana-mana yang berkenaan, memikul beban untuk menunjukkan identiti ibu dan lebih penting lagi, ibu itu tidak bermastautin secara tetap di tempat penemuan. Mengenai fakta, tiada keterangan yang menunjukkan bahawa perayu-perayu berbohong mengenai fakta ditinggalkan. Memandangkan kanak-kanak tersebut dilahirkan di hospital tersebut, pastinya responden mempunyai cara untuk mengesahkan dari rekod kemasukan hospital, identiti ibu kandung kanak-kanak tersebut, tidakpun bapa. Oleh itu, seperti yang terdapat dalam rekod, responden tidak mampu meringankan beban tersebut. Tiada afidavit diikrarkan atau sedikit keterangan yang dikemukakan untuk mencadangkan bahawa naratif yang diberikan oleh perayu secara semula jadi adalah luar biasa atau malah palsu atau tidak benar. Oleh itu, responden tidak dapat melepaskan beban tersebut (lihat perenggan 56 & 58).

(4) Sebaik sahaja ditunjukkan atau dimaklumkan bahawa anak yang baru dilahirkan 'dijumpai tanpa perlindungan', atau ditinggalkan, dua perkara menjadi anggapan: (a) kanak-kanak tersebut dilahirkan oleh ibu yang bermastautin tetap di tempat dijumpai ditinggalkan (anggapan *jus sanguinis*); dan (b) tarikh dijumpai diambil sebagai tarikh lahir. Sebaik sahaja s 19B diguna pakai, mana-mana pihak yang mencabar mana-mana anggapan ini mesti sama ada menunjukkan bahawa: (i) kanak-kanak tersebut tidak dilahirkan daripada ibu yang bermastautin tetap di tempat anak yang baru dilahirkan dijumpai; atau (ii) tarikh dijumpai bukanlah

tarikh lahir. Anggapan tersebut, sebaik sahaja diguna pakai, secara automatik berfungsi untuk melengkapkan aspek *jus sanguinis* (penjaga) s 1(a) melainkan sesiapa yang mendakwa sebaliknya boleh membuktikan sebaliknya (lihat perenggan 59–61).

(5) Memandangkan kanak-kanak tersebut ditemui ditinggalkan di Hospital Universiti Kebangsaan Malaysia, ia dianggap bahawa beliau dilahirkan oleh seorang ibu yang bermastautin tetap di sana. Seterusnya bahawa beliau telah diambil untuk memenuhi keperluan s 1(a) Bahagian II dibaca dengan s 19B Bahagian III kerana beliau, yang dilahirkan di Hospital Universiti Kebangsaan Malaysia, telah dilahirkan di dalam Persekutuan dan ibunya dianggap sebagai bermastautin tetap di Persekutuan. Di dalam premis tersebut, kanak-kanak tersebut berhak mendapat kewarganegaraan berdasarkan undang-undang menurut s 1(a) Bahagian II yang dibaca bersama s 19B Bahagian III. Perayu telah diberikan: (a) satu perintah certiorari untuk membatalkan keputusan responden dalam mengeluarkan sijil kelahiran ketiga dan mendaftarkan anak tersebut sebagai bukan warganegara, sebaliknya adalah warganegara Malaysia; dan (b) satu perintah mandamus mengarahkan responden untuk mengeluarkan semula sijil kelahiran kanak-kanak untuk mendaftarkan kanak-kanak tersebut sebagai warganegara Malaysia (lihat perenggan 62–63 & 75).

(6) Mengguna pakai undang-undang kepada fakta, adalah jelas sekali bahawa responden gagal membawa tanggapan mereka kepada peruntukan dalam s 19B Bahagian III. Hujahan peguam persekutuan kanan yang bijakasana bahawa perayu menyembunyikan fakta yang mendakwa perayu sebenarnya mengetahui identiti ibu bapa kandung kanak-kanak tersebut, tidak disokong oleh keterangan. Daripada menafikan kewarganegaraan kanak-kanak tersebut kerana mereka tidak dapat mengumpul apa-apa keterangan mengenai kelahiran/ibu bapa kandung kanak-kanak tersebut, responden sepatutnya telah mengguna pakai s 1(a) Bahagian II yang dibaca bersama dengan s 19B Bahagian III. Mereka tidak mempunyai hak atau budi bicara untuk melakukan apa-apa lagi, lebih-lebih lagi menyebabkan kanak-kanak tersebut tanpa warganegara (lihat perenggan 69 & 71).]

Cases referred to

CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors [2021] 4 MLJ 236, FC (folld)

Merdeka University Berhad v Government pf Malaysia [1981] 2 MLJ 356 (refd)

Rosliza bt Ibrahim v Kerajaan Negeri Selangor & Anor [2021] 2 MLJ 181, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25, Schedule, para 1
Federal Constitution art 5(1), Second Schedule, Parts I, II, ss 1(a), (e), 2(3), Part III, s 19B
Malaysia Act 1963 [UK]
Rules of Court 2012 O 53 r 3(2)

Cyrus Das (Raymond Mah, Jasmine Wong and Eric Toh with him) (Mah Weng Kwai & Assoc) for the appellant.
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Low Wei Loke (Larissa Ann Louis with her) watching brief for Bar Council.
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Tengku Maimun Chief Justice (delivering judgment of the court):

INTRODUCTION

[1] This appeal concerns essentially the question of the entitlement of a child, who was abandoned at birth and later adopted, to Malaysian citizenship by operation of law.

[2] The two appellants in this case are CCH and ADY. In addition to being joint litigation representatives, the first appellant is the adoptive father and the second appellant the adoptive mother of their adopted child CYM. For ease of reference we shall refer to both adoptive parents as the 'appellants', and to CYM as the 'child'. We have redacted their names in order to maintain anonymity.

[3] The respondent is the Registrar-General of Births and Deaths of Malaysia, a department that operates under the purview of the Ministry of Home Affairs, Government of Malaysia.

[4] This case began when the appellants filed an application for judicial review against the respondent in the High Court seeking for the following reliefs:

1. A declaration that [*name redacted*], a child ('Child') is a citizen of Malaysia by operation of law by virtue of his birth within the Federation of Malaysia pursuant to Article 14(1)(b), Part II section 1 paragraph (e) and section 2(3) of the Second Schedule of the Federal Constitution;

2. A declaration that the Child is a citizen of Malaysia by operation of law by virtue of his lawful adoption by the Applicants pursuant to the Order for adoption dated 20.7.2017 made by the Pulau Pinang High Court in Adoption No. PA-34-3-01/2017, read with sections 9 and 25A of the

Adoption Act 1952 and Article 14(1)(b) and Part II section (1) paragraph (a) of the Second Schedule of the Federal Constitution;

3. An order of certiorari to quash the decision of the Respondent of 21.9.2017 to issue the birth certificate (Register No: 00019676, Serial No.: 001692XA) dated 21.9.2017 ('Birth Certificate') of the Child and signed by the Respondent which registers the Child as a non-citizen (*bukan warganegara*) instead of a citizen of Malaysia;

4. An order of mandamus directing the Respondent to reissue the birth certificate of the Child to register the Child as a citizen of Malaysia;

5. ... [*prayer for costs*] ...

6. Such further Orders and/or directions as may be given or made as this Honourable Court deems fit and just in the circumstances.

[5] For ease of comprehension and unless otherwise stated, all references in this judgment to 'articles' and 'Second Schedule' are to that of the Federal Constitution ('the FC'). Similarly, and unless otherwise stated, any references to Part II or Part III are to that of the Second Schedule of the FC.

BACKGROUND FACTS

Preliminaries

[6] The facts of this appeal are as gleaned and modified from the judgments of the courts below, submissions of parties and the affidavits and other cause papers filed in the judicial review application.

[7] The fulcrum of the judicial review application in this case is the decision of the respondent dated 21 September 2017 to issue a birth certificate ('third birth certificate') to the child stating that the child is not a citizen of Malaysia. The reason why we call it the 'third birth certificate' is adumbrated below.

General context

[8] From the narrative provided by the appellants in their affidavits filed in the High Court, the salient facts can be summarised thus.

[9] Sometime in January 2004, the appellants were informed by a friend of theirs that a baby boy ('the child') was born and abandoned at Hospital Universiti Kebangsaan Malaysia, Cheras. The appellants jointly decided that they would adopt the child and named him CYM.

[10] According to the appellants, they were under the impression that they had formally adopted CYM. As such, when they completed the forms and

provided information to the respondent, they represented themselves as the child's biological parents. The respondent accordingly issued the appellants with the child's birth certificate on 20 February 2004 ('first birth certificate').

[11] Sometime in April 2016, the child turned twelve years old and like is usually the case with all parents, the appellants applied to the National Registration Department ('NRD') for a MyKad for the child. The NRD declined to issue a MyKad to the child.

[12] The appellants state that in the process of applying for the MyKad, the NRD officer who inspected the child's first birth certificate, apparently noted some inaccuracies in their names. This was either between the appellants and the child or between the appellants' children (that is the child and another female child that the appellants had earlier adopted — with the initials TYS).

[13] The appellants averred that TYS is another child who they believed to have formally adopted (before CYM) under their name but who was actually placed under the guardianship and care of a couple loosely called Mr and Mrs Tan. Going strictly by what has been averred in the affidavits, we assume that TYS took her surname from Mr Tan even though her actual 'parents' as recorded in her birth certificate appear to be the appellants. The appellants have not exhibited TYS's birth certificate as proof of this fact but we have no reason to disbelieve it as the respondent did not aver anything to the contrary and considering that the respondent has access to the records and documents necessary to rebut these facts.

[14] Thus, from our understanding and following the logical flow of the facts as recounted by the appellants, the respondent had reason to believe that the appellants were not the biological parents of the child because when they inspected the child's first birth certificate, they noticed a difference in surnames between TYS and the child.

[15] Our understanding of the above facts is derived from the averments in the appellants' affidavit in reply dated 12 April 2019 (*RR*, Vol 2, p 160):

> 4.8 We were subsequently investigated by an NRD officer in respect of the accuracy of our names on the Child's first birth certificate. We subsequently understood from the NRD officer that the Child has not been formally adopted.
>
> 4.9 During the course of the investigations, we informed the NRD officer that TYS has also not been formally adopted.

[16] As a matter of fact, we noticed a similar discrepancy as well. In their earlier mentioned affidavit of 12 April 2019, the appellants refer to their said adopted daughter as TYS — T being the surname of Mr Tan. However, in the

corrective form that the appellants filed leading up to the issuance of the second birth certificate, the appellants listed their adoptive daughter in the 'Family Information' segment of the corrective form as CYS, the 'C' being the surname of CCH (see: the correction form located in *RR*, Vol 3, p 400).

[17] The respondent has not really explained the actual reason that made them realise and inquire into the fact that the appellants are not the child's biological parents. The only thing we have to go by is a very general statement in the only affidavit filed by the respondent dated 22 March 2019, as follows (as translated into English):

> 5.3. In 2016, the Child's birth certificate was withdrawn after an investigation by the National Registration Department revealed that the Applicants are not the birth parents of the Child.

[18] In any case, in that affidavit of 12 April 2019, the appellants went on to aver that the NRD officer explained to the appellants that they (the appellants) would have to surrender the first birth certificate so that a new birth certificate could be issued for the child stating the correct facts of parenthood.

[19] The appellants complied, surrendered the first birth certificate and accordingly on 3 November 2016 were issued with a new birth certificate for the child ('second birth certificate').

[20] The second birth certificate, most crucially, recorded the child's parents' information as 'not available' ('maklumat tidak diperoleh') and the child's citizenship status as 'yet to be determined' ('belum ditentukan').

The third birth certificate and the filing of the judicial review application

[21] Dissatisfied with the details (or lack thereof) contained in the second birth certificate, the appellants sought legal advice from their present solicitors and were accordingly advised that they ought to formally adopt the child. The appellants thus filed an originating summons in the High Court in Malaya at Penang in Case Number PA-34–3–01 of 2017 ('adoption summons').

[22] On 20 July 2017, the learned judicial commissioner who heard the adoption summons was satisfied that the appellants were fit and proper persons to be declared the adoptive parents of the child. His Lordship, after the usual process of hearing from the Welfare Department and completing the standard procedures, pronounced the following final orders (translated into English) which we think are pertinent to reproduce ('adoption order'):

> 1. That CCH and ADY be given the power to adopt CYM [Birth Certificate No: *redacted*] ('the Child') (referring to the first birth certificate) pursuant

to the Adoption Act 1952 ('the said Act').

2. That the Registrar of Births and Deaths of Malaysia is directed to make an entry to record this adoption in the Register of Adoption in the Form contained in First Schedule to the Act, pursuant to section 25(2) of the said Act, as per Annexure A.

3. That the Registrar of Births and Deaths of Malaysia is directed to issue a Birth Certificate to the Child under the said Act.

4. That the Registrar of Births and Deaths of Malaysia is directed not to enter the words 'adopted child' or any other words with the same connotation in the Birth Certificate of the Child.

5. That the Plaintiffs (the present appellants) be given leave to retain the name of the Child as CYM, and to register the Child's name as CYM in the Birth Certificate.

6. That the Birth Certificate of the Child [Birth Certificate No.: *redacted*] (referring to the second birth certificate) be surrendered to the Registrar of Births and Deaths of Malaysia.

[23] In Annexure 'A' of the adoption order, under the header 'Date and State of Birth of the Child', it is recorded as a fact that the child was born on 31 January 2004 at Hospital Universiti Kebangsaan Malaysia, Cheras.

[24] Armed with the adoption order, the appellants again made their way to the NRD and reapplied for a new birth certificate for the child. On 21 September 2017, the respondent issued the third birth certificate (exh A7 of CCH's affidavit dated 11 December 2017 filed in support of the judicial review application (*RR*, Vol 3, p 389).

[25] The material differences between the third birth certificate and the second birth certificate are as follows:

(a) the information in the column on 'status of citizenship' was changed from 'yet to be determined' to 'non-citizen' ('bukan warganegara');

(b) the colour of the birth certificate was changed from greyish-green (the colour coding for citizens) to pinkish-red which is the colour coding for non-citizens; and

(c) the status of father and mother were changed from 'information not obtained' to CCH (father) and ADY (mother) respectively.

[26] The primary issue the appellants have with the changes made in the third birth certificate is that the child was essentially rendered a non-citizen and since he is not a citizen of any other country, effectively stateless.

[27] The underlying purpose of their judicial review application and thus this appeal is therefore to seek declaratory relief and related orders to the effect that the child is entitled to citizenship by operation of law.

[28] A material fact to take note of is that the appellants have averred, and the respondent cannot appear to suggest otherwise, that the citizenship status and identities of the child's biological parents in this case are completely unknown. See para 1.4 of the statement filed by the appellants pursuant to O 53 r 3(2) of the Rules of Court 2012. The second and third birth certificates are also reflective of this fact.

The material constitutional provisions

[29] After reading and hearing the written and oral submissions respectively of parties, we respectfully concluded that the arguments taken were essentially the same as the ones advanced and decided in the courts below.

[30] Before delving into the arguments, we find it necessary to first set out the constitutional provisions material to this appeal as follows:

> Article 14 (Citizen by operation of law)
>
> 14(1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:
>
> (a) ...
>
> (b) every person born on or after Merdeka Day, and having any of the qualifications specified in Part II of the Second Schedule ...
>
> Article 31 (Application of Second Schedule)
>
> 31. Until Parliament otherwise provides, the supplementary provisions contained in Part III of the Second Schedule shall have effect for the purposes of this Part.
>
> ...
>
> SECOND SCHEDULE
>
> ...
>
> PART II
>
> [Article 14(1)(b)]
>
> CITIZENSHIP BY OPERATION OF LAW OF PERSONS BORN ON OR AFTER MALAYSIA DAY
>
> 1. Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say:
>
> (a) every person born within the Federation of whose parents one at least is at the time of birth either a citizen or permanently resident in the Federation; and ...
>
> ...

(e) every person born within the Federation who is not born a citizen of any country otherwise than by virtue of this paragraph.

2. (1) ...

(2) ...

(3) For the purposes of paragraph (e) of section 1 a person is to be treated as having at birth any citizenship which he acquires within one year afterwards by virtue of any provisions corresponding to paragraph (c) of that section or otherwise.

PART III

[Article 31]

SUPPLEMENTARY PROVISIONS RELATING TO CITIZENSHIP

...

Interpretation

...

19B. For the purposes of Part I or II of this Schedule any new born child found exposed in any place shall be presumed, until the contrary is shown, to have been born there of a mother permanently resident there; and if he is treated by virtue of this section as so born, the date of the finding shall be taken to be the date of the birth.

Submissions and decisions of the courts below

[31] The appellants' contentions in the courts below can be summarised as follows.

[32] Firstly, the appellants appeared to argue that the child is entitled to citizenship under s 1(e) of Part II. It was suggested that the said s 1(e) which is only qualified by s 2(3) of Part II, s 19B and other related sections were inserted by the constitutional amendments effected through the Malaysia Act 1963 to guard against statelessness. Learned counsel essentially argued that because the child was born an abandoned child, there is no proof that he is a citizen of any other country and is thereby entitled to citizenship under s 1(e).

[33] On this issue, the courts below found, based on previously decided cases that in order to fulfil the requirements of s 1(e), the applicant must show that his or her birth parents are not citizens of any other country.

[34] In the present case, the respondent, in refusing to accord the child citizenship under that provision deposed exactly that. In his affidavit in reply dated 22 February 2019, the then Director-General of NRD cum Registrar-General of Births and Deaths deposed as follows (as translated into English):

> 8. ... I state that the said Child (referring to CYM) was registered as a non-citizen as there was no credible evidence of the birth of the Child specifically information relating to the citizenship status of his birth parents.

[35] The second argument advanced by the appellants was that the child ought to be accorded citizenship pursuant to s 1(a) of Part II. The appellants contended that the words 'parents' in that section ought to be construed liberally to include adoptive parents. They further argued that provisions of the Adoption Act 1952 which confer full legal rights on adoptive parents and which extinguish all legal connection to the biological parents, ought to be read into s 1(a).

[36] The High Court and the Court of Appeal rejected this argument. Both courts were guided by earlier precedents of the High Court and the Court of Appeal which have held that s 1(a) must be construed having regard to the words 'at the time of birth'. As such, the courts below were of the view that the word 'parents' means biological parents and is essentially incapable of being stretched to mean 'adoptive parents'. Further, reliance cannot be placed on ordinary law to interpret provisions of the FC which reigns supreme.

Proceedings in the Federal Court

[37] In light of the above arguments and the decisions rendered thereupon, the appellants sought leave to appeal to this court. The five questions ('leave questions') which were allowed are these:

> Question 1
>
> Whether a child who (i) was born in Malaysia and (ii) did not acquire citizenship of any other country within one year from his date of birth, is a citizen of Malaysia by operation of law pursuant to Article 14(1)(b) and Part II Section 1(e) and Section 2(3) of the Second Schedule of the Federal Constitution?
>
> Question 2
>
> Whether Part II Section 1(e) of the Second Schedule of the Federal Constitution requires a child to prove the identity of his/her biological parents and/or that they are not foreign citizens?
>
> Question 3
>
> Whether the word 'parents' in Part II Section 1(a) of the Second Schedule of the Federal Constitution should be given a restrictive interpretation to mean only the child's biological parents?
>
> Question 4
>
> Whether a certificate of birth issued under Section 25A of the Adoption Act 1952 shall pursuant to subsection (5) 'for all purposes be known as the Certificate of Birth of the child' and pursuant to subsection (6) 'shall be received without further or

other proof as evidence' of the child's parents for the purposes of Article 14(1)(b) and Part II Section 1(a) of the Second Schedule of the Federal Constitution?

Question 5

Whether a birth certificate which has been 'surrendered' to the Registrar-General of Births and Deaths pursuant to Section 25A(1)(b) of the Adoption Act 1952 and 'replaced' by a new birth certificate issued pursuant to section 25A(5) of the Adoption Act 1952, can still be referred to by the Registrar General of Births and Deaths or the courts for the purposes of determining the child's 'parents'?

OUR DECISION/ANALYSIS

Whether the child is entitled to citizenship by operation of law

The scope of the arguments

[38] We begin our analysis by recording our gratitude to learned counsel for the appellants, Dato' Dr Cyrus Das, for his efforts in meticulously taking us through the legislative history leading up to the insertion of the provisions of ss 1(e) and 2(3) of Part II and s 19B of Part III into the FC. Without expressly setting out those provisions, we accept that the speeches and debates that took place in Parliament in respect of those amendments clearly establish that the purpose of their insertion was to guard against statelessness. We also commend learned counsel for the arguments he advanced on s 1(a) in relation to the interpretation of the phrase 'parents' therein appearing and how it includes 'adoptive' parents.

[39] That said, one will notice that we have taken great pains to state the facts of this case in as much detail as possible. After considering the facts of this case in light of the submissions made, we are of the considered view that none of the leave questions need be considered or answered. This is because the peculiar facts and circumstances of this case do not call for such deliberation.

[40] During the hearing of this case, we queried counsel for the appellant on whether s 19B of Part III ought to be read together with s 1(a) of Part II. He conceded that such a reading was possible. We also asked the same question of learned senior federal counsel ('SFC') Shamsul Bolhassan and he accepted the same though he took issue with the facts ie that he is unable to concede that the child was in fact abandoned. We shall address that issue later.

[41] It is trite that while concessions of fact bind parties, concessions of law do not. This is a court of law and just because parties concede that something is or is not law, that itself does make it the legal position. On issues of law, courts are always required to apply their own judicial minds and reasoning to

determine points of law quite without regard to parties' concessions on them. We shall therefore proceed to deliberate on the application of s 1(a) of Part II read alongside with s 19B of Part III.

Interpretation of s 1(a) of Part II and s 19B of Part III

[42] It is our considered view that the child in this case is entitled to citizenship by operation of law pursuant to s 1(a) of Part II read together with s 19B of Part III. Although we have already set out the provisions earlier, for ease of reference, we set out both ss 1(a) and 19B together again, as follows:

> Section 1(a) of Part II:
>
> 1. Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say:
>
> (a) every person born within the Federation of whose parents one at least is at the time of birth either a citizen or permanently resident in the Federation; and ...
>
> Section 19B of Part III:
>
> 19B. For the purposes of Part I or II of this Schedule any new born child found exposed in any place shall be presumed, until the contrary is shown, *to have been born there of a mother permanently resident there*; and if he is treated by virtue of this section as so born, the date of the finding shall be taken to be the date of the birth. (Emphasis added.)

[43] Dato' Dr Cyrus Das referred us to the dissenting judgment of this court in *CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2021] 4 MLJ 236 ('CTEB') where it was stated that Part III which contains enabling provisions is meant to aid or assist in the interpretation of Parts I and II, and not to qualify or conditionalise the application of Parts I and II to Part III. The dissenting judgment had commented on s 19B of Part III, as follows:

> [65] Both ss 19A and 19B of Part III are constitutional presumptions as to births. Section 19A codifies in part the international principle of flag state jurisdiction and applies in relation to persons who are born on a vessel such that their birth there is attributed to the place of registration of the vessel. *Section 19B applies in relation to children who are found abandoned in any given place such that the place of abandonment is treated as their place of birth and where their mother is also permanently resident there.*
>
> [66] All the above sections, namely ss 17, 19, 19A and 19B exist as supplementary or filler sections — so to speak — *to supplement or to close any gaps or to resolve technicalities that may arise when the person's parents' identity is in issue or even if their own place of birth is in issue so long as that is a relevant question for the purposes of Part I or Part II respectively*. (Emphasis added.)

[44] The principles of *jus soli* and *jus sanguinis* as well as the principles on

how the FC was drafted to enable citizenship as broadly as possible while weeding out statelessness have been discussed in great length by the minority of this court in *CTEB*. We adopt the reasoning there as part of this judgment being the only other decision of the Federal Court apart from this one, to our knowledge, to have touched on this issue most recently.

[45] Before proceeding to examine s 19B with those principles in mind, we seek to remind ourselves of other important concepts on constitutional interpretation.

[46] Citizenship no doubt is governed by Part III of the FC, but it is also a concept so inextricably linked to the right to life and personal liberty contained in art 5(1). As such, any provisions on it must be construed as widely as possible.

[47] Having said that, we are completely mindful of the following warning by Abdoolcader J (as he then was) in *Merdeka University Berhad v Government pf Malaysia* [1981] 2 MLJ 356, at p 360:

> I said in *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116 ... that the Constitution is not to be construed in any narrow or pedantic sense (*James v Commonwealth of Australia* [1936] AC 578) ... *but this does not mean that a court is at liberty to stretch or pervert the language of the Constitution in the interests of any legal or constitutional theory, or even, I would add, for the purpose of supplying omissions or of correcting supposed errors.* (Emphasis added.)

[48] The courts have always had to do battle with these two conflicting principles. On the one hand, it is said that the Judiciary cannot purport to usurp the role of the Legislature. On the other hand, it is said that the Judiciary must be proactive to protect fundamental rights. No matter the argument, we are constantly reminded of these fears and/or duties by both sides taking their respective positions in constitutional cases. Where do we draw the line between these two extremes?

[49] We believe that the answer to the question has been discussed an innumerable amount of times with the most recent being *CTEB*. The starting point is the understanding that fundamental rights and provisions must be construed as broadly as possible. Next, provisions which limit those rights must be construed as narrowly as possible. Finally, judicial precedent must play a lesser part when construing constitutional provisions. One cannot afford to be pedantic or cling helplessly to tabulated legalism.

[50] When construing a word or words in the FC protective of or guaranteeing a fundamental right, the court should give their widest possible meaning without changing or warping the 'base' meaning. And when

construing interrelated provisions, the court should read them as a whole having regard to the purpose and intent of those provisions and harmonise their collective meaning rather than put them at odds with another.

[51] With the above principles in mind, we now come to s 1(a) of Part II and s 19B of Part III.

[52] Section 1(a) of Part II very clearly adopts the concepts of *jus soli* (citizenship based on birth place) and *jus sanguinis* (citizenship based on blood relation). Section 19B in turn contains two presumptions — one of which relate to *jus sanguinis*.

[53] The operative words in s 19B are 'any new born child found *exposed* in any place'. The purpose of this section, when read in context, must be to cover new born children who are left and discovered in a place without any trace of their biological parents. We take judicial notice of the harsh realities of life: this includes new born children left abandoned near dumpsites, baby hatches, public or school toilets, places of worship and so on. A literal meaning of 'exposed' suggests a new born child who was 'discovered' exposed at any of these locations.

[54] As such, the broadest possible interpretation of the word 'found exposed' is to accord it a meaning to include a child abandoned at the place of birth by the birth mother whose identity is unknown. The operative word 'exposed' in s 19B must therefore encompass the plight of abandoned new born children, otherwise the overarching intent of preventing statelessness would be defeated or rendered illusory.

[55] In the present case, we took pains to emphasise that throughout the course of this case, it has been an accepted fact that the child is an abandoned child who was born in Hospital Universiti Kebangsaan Malaysia, Cheras. This fact was acknowledged in the adoption order and in the third birth certificate. During the hearing, learned SFC disagreed with the application of s 19B to the facts of this appeal, suggesting that the appellants had actively concealed facts, that the identity of the biological parents is known or discoverable but kept hidden.

[56] The simple answer to that assertion is this. The follow up words in s 19B are contained in the phrase 'until the contrary is shown'. Meaning, any person who claims that the child was not 'found exposed' or otherwise abandoned by the mother as the case may be, bears the burden of showing the identity of the mother and more importantly, that the mother is not permanently resident at the place of the finding.

A **[57]** Evidence-wise, the answer to this predicament is in the recent judgment of this court in *Rosliza bt Ibrahim v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 181 ('Rosliza') which deals with proof of negative facts. It is quite illogical in this appeal to expect the appellants to show that they do not have knowledge of the biological parents or the mother at least. This is what the appellants averred in their affidavit in reply dated 12 April 2019:

> 4.5 In January 2004, we were informed by a friend that a baby boy (the Child) has been *born and abandoned* at Hospital University Kebangsaan Malaysia, Cheras. We decided to adopt the Child and named him CYM ...

C **[58]** There is nothing in the evidence, as far as we have examined it, to suggest that the appellants were lying about the fact of abandonment. According to s 19B therefore, the burden of showing that the child's mother was not permanently resident at the place of finding rests on the respondent. D Given that the child was born in the said hospital, surely the respondent has the means to verify from the hospital's admission records, the identity of the child's biological mother, if not the father. Therefore, as the record stands, the respondent has not been able to discharge that burden. No affidavit has been deposed nor a modicum of evidence adduced to suggest that the narrative E provided by the appellants is inherently incredible or even false or untrue.

[59] This leads us now to the final portions of s 19B. Once it is shown or averred that a new born child is 'found exposed' (or abandoned), two things are F presumed, that is:

(a) that the child is born to a mother who is permanently resident at the place where the finding was made (the *jus sanguinis* presumption); and

(b) the date of the finding is taken as the date of the birth.

G **[60]** Once s 19B is invoked, any party challenging any of these presumptions must either show that: (a) the child was not born of a mother permanently resident at the place where the new born child was found; or (b) the date of the finding is not the date of the birth. It is really only a contest on the earlier which H determines citizenship because of the wording of s 1(a) which requires that a child born within the Federation to be born of at least either one parent who is either a citizen or, more important to this case, of a parent permanently resident in the Federation.

I **[61]** Putting it another way, the place of the finding, if within the Federation would satisfy the *jus soli* requirement of s 1(a) of Part II. The presumption, once it applies, automatically serves to complete the *jus sanguinis* (parenthood) aspect of s 1(a) unless anyone claiming to the contrary can prove otherwise.

[62] Hence, what remains at this stage is a simple application of the law to the facts of the case. Since the child was found abandoned in the location aforementioned, it is presumed that he was born to a mother permanently resident there. It follows that he is taken to fulfil the requirements of s 1(a) of Part II read with s 19B of Part III as he, having been born at Hospital Universiti Kebangsaan Malaysia, was born within the Federation and his mother is presumed to be permanently resident in the Federation.

[63] In the premises, it is our judgment that the child is quite simply entitled to citizenship by operation of law by virtue of s 1(a) of Part II read with s 19B of Part III.

THE EFFECT OF THIS JUDGMENT

[64] Having determined the citizenship issue, the only remaining matter is the effect of this judgment which is several fold.

[65] Firstly, a wholesome reading of s 1(a) of Part II with s 19B of Part III obviates the need for us to consider whether the child was stateless. A discussion on the effect of ss 1(e) and 2(3) of Part II is therefore unnecessary. Similarly, the right of the appellants as adoptive parents to confer citizenship on the child vis a vis s 1(a) of Part II is also unnecessary because the application of the presumption in s 19B operates to confer citizenship on the child even prior to the fact of his adoption whether considered informally in 2004 or formally by the fact of the adoption order in 2017.

[66] Secondly, the natural result of our above discussion is that this appeal must be allowed. The judgments of the High Court and Court of Appeal are reversed and set aside *in toto* and ought not to be relied upon as precedent in the future as all observations made on the application of ss 1(e) and 1(a) (in relation to adoptive parents) are obiter dicta given that the facts of this case do not call for such legal findings.

[67] Thirdly, this case is now precedent on how the Ministry of Home Affairs (generally) and the NRD and Registrar-General of Births and Deaths (specifically) ought to deal with all such future cases within the context of abandoned new born children. When confronted with an application for registration of such new born children, the burden is on the respondent to undertake proper investigations to determine the status of such child's biological parents or mother. If, after investigation, it is found that the fact of abandonment is true, the respondent is obligated by the highest law of the land in s 19B of Part III to recognise that new born child's citizenship by operation of law, except where there is evidence to the contrary as we had stated in para 60 earlier.

[68] This therefore brings into sharp focus the conduct of the respondent in this case. We had earlier referred to the following averment by the then Director-General of NRD cum Registrar-General of Births and Deaths who deposed as follows in his affidavit in reply dated 22 February 2019:

> 8. ... I state that the said Child (referring to CYM) was registered as a non-citizen *as there was no credible evidence of the birth* of the Child specifically information relating to the citizenship status of his birth parents. (Emphasis added.)

[69] Applying the law to the facts, and to repeat what was said earlier, it is abundantly clear that the respondent failed to apply their minds to the provision in s 19B of Part III. Following *Rosliza*, how are the appellants to prove a negative fact, that is, the fact that they do not know the biological parents of the child? The learned SFC contended that the appellants concealed facts which in turn connotes that the appellants somehow know the identity of the child's biological parents. This, with respect, is mere supposition unsupported by evidence.

[70] The Ministry of Home Affairs, of which the respondent is an integral part, have all the important machinery of the State at their disposal to conduct appropriate investigations to ascertain the truth. The fact that they could not eventually determine the identity of the biological parents of the child or adduce any evidence of the biological lineage of the child indicates that they have not discharged their legal burden to rebut the presumption of permanent residence of the child's mother in s 19B. Further, the respondent did not directly address or respond to any of the positive averments made by the appellants regarding how the child was found abandoned, thus leaving those averments admitted.

[71] In the circumstances, rather than denying the child citizenship because they were unable to gather any evidence of the child's birth/biological parents, the respondent ought to have given effect to s 1(a) of Part II read together with s 19B of Part III. They had no right or discretion to do anything else certainly much less render the child stateless.

[72] In this regard and with respect, we are minded to observe that citizenship by operation of law is a right — a fundamental and constitutional right. It leaves absolutely no room for the exercise of subjective notions or presuppositions on what citizenship is. The words citizenship 'by operation of law' could not be any clearer, and there is no room whatsoever for discretion. The FC reigns supreme at all times and the respondent and all related bodies are bound to comply with its dictates.

REMEDIES/CONCLUSION

[73] For the reasons stated above, this appeal is unanimously allowed and we hereby set aside the orders and judgments of the courts below. There shall be no order as to costs as is the standard practice in cases of public interest such as this one.

[74] In terms of the remedy, in light of our analysis, the prayers sought and reproduced in para 4 of this judgment are incapable of enforcement because they do not correspond to the facts of the case. As stated, we make no ruling and/or finding on s 1(a) or 1(e) of Part II in the manner argued by the appellants.

[75] In order to meet the justice of this case, and acting under the inherent power of this court as further supplemented by s 25 of the Courts of Judicature Act 1964 ('the CJA 1964') (with para 1 of the Schedule to the CJA 1964) which allows this court to mould the appropriate relief, we hereby grant the following orders:

1. A declaration that CYM ('Child') is a citizen of Malaysia by operation of law by virtue of his birth within the Federation of Malaysia pursuant to Article 14(1)(b), section (1) paragraph (a) of Part II of the Second Schedule of the Federal Constitution read together with section 19B of Part III of the Second Schedule of the Federal Constitution;

2. An order of certiorari to quash the decision of the respondent of 21.9.2017 to issue the birth certificate (Register No: 00019676, Serial No.: 001692XA) dated 21.9.2017 ('Birth Certificate') of the Child and signed by the Respondent which registers the Child as a non-citizen (*bukan warganegara*) instead of a citizen of Malaysia; and

3. An order in the nature of mandamus directing the Respondent to reissue the birth certificate of the Child to register the Child as a citizen of Malaysia.

[76] As alluded to earlier, in light of our findings above, the leave questions are academic and as such they do not require our further deliberation.

Appeal allowed; orders and judgments of the courts below set aside.

Reported by K Selvaraju